United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7054

To be argued by:
LOUIS C. PULVERMACHER

In The

United States Court of Appeals

For The Second Circuit

STATEN ISLAND SUPPLY COMPANY, INC.,

Plaintiff-Appellee,

vs.

A.O. SMITH CORPORATION, EQUIPMENT DISTRIBUTORS CORP. and BROOKLYN UNION GAS COMPANY,

Defendants,

A.O. SMITH CORPORATION,

Defendant-Appellant.

On Appeal From the United States District Court For the Eastern District of New York

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P/S
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BRIEF FOR PLAINTIFF-APPELLEE

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No. 76-7054

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Defendants,

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Defendant-Appellant.

BRIEF FOR APPELLEE

Statement of Issues

The appeal by defendant-appellant A. O. SMITH CORPORATION ("SMITH") from the order (*222) of the United States District Court, Eastern District of New York (THOMAS C. PLATT, J.) presents the following issues for review:

1. Did the District Court abuse its discretion in denying SMITH's application to dissolve the preliminary injunction?

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* Numbers in parenthesis refer to pages of the joint appendix

2. Did SMITH present new facts to justify SMITH's motion to vacate the previously granted preliminary injunctions?

3. Were the findings of fact below "clearly erroneous"?

STATEMENT OF THE CASE

Plaintiff-Appellee, STATEN ISLAND SUPPLY CO., INC., ("SISCO") "is a small family-owned company founded in 1898 which is engaged in the wholesale distribution of plumbing fixtures and related equipment to plumbing retailers and private individuals primarily on Staten Island but also in the other counties in New York City." (17) In March, 1975, SISCO sought an injunction alleging anti-trust violations on the basis that SMITH imposed territorial restrictions and sought to enforce price-fixing to benefit a favored distributor, defendant EQUIPMENT DISTRIBUTORS CORP. Defendant-Appellant SMITH terminated the distribution agreement when SISCO refused to abide by the edicts of price-fixing and territorial restrictions. SMITH is a multi-division company for whom SISCO "has been a distributor of SMITH's boilers, heaters and plumbing equipment for the past 15 years." (17)

"The proof showed the following record of purchases for resale by SISCO of SMITH's products during the years 1973 and 1974:

Year	Smith Product Purchase for Resale	All Products Including Smith Purchase for Resale
1973	$110,000.00	$420,000.00
1974	290,000.00	672,000.00

"The proof further showed that in 1974 SISCO sold approximately $100,000 of SMITH products to Staten Island customers and that $80,000 of such amount was sold to Staten Island plumbing contractors and $20,000 to Staten Island consumers."

"Plaintiff's first witness was Edmund Schwimer, president of the company, who at the outset of his cross-examination was asked "whether anyone from A. O. Smith ever asked you to fix prices" to which he replied affirmatively and when pressed for further details testified that:

"Approximately 6 months ago and prior to that Mr. Paul Tofe (phonetic) and Bernie Gell (phonetic) [asked us] to upgrade our prices. In fact, it went back further than that; it went back to 1960, where they brought me equipment company price sheets and asked me to get the same price which was a high price. I says, we can't do that. He says, oh, yes, you should."

* * *

"Mr. Paul Tofe says, we're going to stop your distributor-ship and I said, why. He says you're distributing with our heater and you're not keeping the prices up. You're selling them too cheap."

* * *

"I says, we didn't go along with that, it's against the law.

* * *

"He says, we'll see about that."

"They come in the supply and they kept saying, we got to get this straightened out. We're going to cut you out if we don't get things ironed out here."
(Opinion of Platt, J. (18 & 19))

SISCO moved and obtained a temporary restraining order on March 31, 1975. Following three days of hearings, at which two officers of SISCO and one witness (Paul Toth) of SMITH testified, the court below entered an opinion and order (16-28) dated May 1, 1975, granting SISCO a temporary injunction to preserve the status quo and enjoining SMITH from refusing to sell SISCO with certain other restrictions.(27)

SMITH sought to dissolve the preliminary injunction (29-108) four-and-a-half months after entry on the basis that:

1. An officer of SISCO made a disparaging remark about employees of SMITH; (32, 33)

2. SISCO submitted falsified business records. (35,37);

3. SISCO refused to pay certain service costs.(37)

4. SISCO was engaged in dilatory tactics in the prosecution of the case. (37-38)

The court referred the motion to Magistrate Vincent A. Catoggio (222,223) who concluded that SMITH "failed in its efforts to show the existence of new facts such as would justify dissolution of the preliminary injunction granted herein under date of May 1, 1975." (224-230)

POINT I

PUBLIC DISPARAGEMENT (VILLIFICATION) OF SMITH EMPLOYEES

Robert Schwimer, Vice-President of SISCO wrote in a letter dated August 27, 1975, to D.V. Hall, Branch Manager, Products Service Division of Smith, complaining of the conduct of the Regional Sales Manager, P. Toth towards him and his company. Robert Schwimer wrote of Paul Toth and Bernard Gill, SMITH's salesmen servicing SISCO, that "[t]hese two clowns have toyed with prices." (41) He questioned "how a large corporation can be had by a few creeps they employ The italicized words, and the further comment that "[they] lack ... business knowledge" (42) are the basis of the public villification charges alleged by SMITH. These charges do not relate to SMITH but to a grievance made to a SMITH representative concerning its regional sales manager and salesman.

Although the Magistrate found there was only a single occurrence (224), there is some support for SMITH's contention that there was a subsequent publication of the disparaging words being contained in a letter written by Paul Toth disinviting Robert Schwimer to a weekend outing conducted by SMITH for distributors who achieved a certain sales volume. Mr. Toth in his letter to Robert Schwimer (207)

stated "We are not inviting you to attend the Tides weekend personally partly because . . . you have circulated . . . a letter referring to me as a 'clown, 'creep', and lacking business judgment."

Robert Schwimer, SISCO's representative had been scheduled to attend such weekend and had arranged to meet with other distributors. Upon receiving notification of the disinvitation from Paul Toth, Robert Schwimer circulated (206) Toth's letter disinviting him (207) to the weekend to those persons he made arrangements to confer with. The Regional Manager (207) in his letter used the words complained of, "clown", "creep" and "lacking in business judgment". Mr. Schwimer then sent Mr. Toth's letter to other distributors as the reason he would not attend the meetings he had arranged (206). Thus the recirculation complained of by SMITH is merely the circulation of the Regional Manager's own letter (207) in which the complained of words appear. The Regional Manager is the senior SMITH official in the northeastern region. There have been serious difficulties in the ordinary personal dealings between SISCO and Paul Toth as Paul Toth claims: "I find Robert Schwimer's willingness to lie disturbing" (185). Mr. Schwimer offered his apologies for the circulation of Mr. Toth's letter, for the "use of certain words in describing Messrs. Toth and Gill" (147), and said:

"The Court will recognize the frustration, embarrassment and loss of sales that these two gentlemen have caused me both prior to and since the granting of the preliminary injunction ...."

Mr. Toth, on the other hand -

"Feel(s) that Robert Schwimer has taken the Court's preliminary injunction order as a license to abuse me personally as well as to flaunt Smith's interests." (185)

SISCO had attained the goals which would have qualified SISCO's officer to attend the free social weekend. In retaliation for the transmission to D.V. Hall of SMITH, of the offending letter, the regional manager disinvited Robert Schwimer.

Mr. Schwimer learned, prior to the transmission of the offending letter, that SISCO's name had been deleted from SMITH's mailing list (160,187, 196) and that SISCO had not received a notice effective May 1975, concerning a five (5%) discount program offered by SMITH on certain heaters. In late July, 1975 (143) SISCO was verbally advised of the discount offer. Shortly thereafter the offer was terminated. (44) The economic result was to impair SISCO's sales of the discounted item totaling $63,569.00 (144) and a resulting loss to SISCO of $6,356.92 in profits. (145)

A. REFUSAL TO PAY

SMITH persists in this argument relative to the claim of $5,578.91, (201) although as observed by the

Magistrate,"all payments have been made to SMITH in accordance with its charges." (225) The total sum consists of nine items of which the first three appearing on page "19" of SMITH's brief represent service calls aggregating $720.25, a fourth item for a returned heater rejected credit of $549.00. The remaining five items aggregate $3,309.13, and represent the 5% discount claimed under the special heaters program (supra page 7). The cause of this dispute stems from removal of SISCO's name from SMITH's mailing list and the late verbal advice of the existence of a planned discount program. When SISCO complained to SMITH that its prices on the heaters were not competitive, SMITH acknowledged the discount program and then terminated the plan five weeks later, which plan had never been presented in writing, causing SISCO a loss of $6,352.92. Confusion existed as to the terms of the offer. SISCO claimed and deducted $3,309.13, representing the 5% discount based on the verbal terms of the offer as disclosed by SMITH. The Magistrate strongly urged this payment and payment was made "under protest."(225)

Clearly this claim that SISCO refused to pay had its basis in the failure of SMITH, in violation of the Court's order that "if Smith shall at any time offer any distributor better conditions as in the foregoing, the

same shall be offered to plaintiff ..." (27), to advise SISCO of the discount plan.

Thus, of the total sum of $4,578.91, $3,309.13 was in sharp dispute that is yet to be resolved and the dispute really centered on $720.25 being involved in service calls - from an account that had purchased $290,000.00 from SMITH in 1974. (18)

B. BUSINESS RECORDS

The court below set forth that the basis of the granting of the preliminary injunction was:

> "...[C]learly there is sufficient evidence to indicate conduct in furtherance of the alleged violations of such [anti-trust] laws; e.g., evidence indicating unlawful attempts to allocate territory, fix prices, use of coercive tactics, predatory purcposes, etc." (25)

Under the distributor relationship that had existed the distributor was required to replace water heaters which leaked (referred to in the industry as leakers) and to file written reports with SMITH relating to such replacement in order to obtain the appropriate credit from SMITH.

SISCO recognized that if it filed reports of leakers indicating the correct address to which a

replacement was delivered and such location was off Staten Island, such disclosure would substantiate defendant SMITH's contention that SISCO was selling heaters off Staten Island. Plaintiff had consistently denied such sales. To avoid admitting the breach of the SMITH imposed restriction not to sell out of the Staten Island area, SISCO engaged since 1972 in the admittedly deceptive practice of filing false replacement reports (1470148), which practice continued after the granting of the preliminary injunction as SISCO's officer "forgot about the subterfuge I had been forced to engaged in previously and failed to notify the record keeper that this subterfuge was no longer needed" (149) and when advised of the error immediately acknowledged the existence of the procedure (41-42)without the necessity of Court intervention or supervision.

As to the claim of filing false reports - only the name and address was false. SMITH makes no claim that the submission of false reports cost it any monetary damage or that SISCO received a credit fee which it was not entitled to. The technical detail was accurate and the practice had been carried on for three years prior to the granting of the injunction.

SMITH admittedly deleted SISCO's name from its mailing list for a period of several months (147) which is a "dereliction" and a violation of the opinion and order of Judge Platt dated May 1, 1975.

C. PLAINTIFF IS NOT ENGAGED IN DILATORY TACTICS

The other basis which SMITH claims as appropriate to dissolve the injunction is SISCO's dilatory tactics in refusing to proceed with discovery. The Magistrate stated:

> "Smith's interrogatories are as complex and complicated a puzzle as any jig-saw that may be contrived and Smith's attorneys have been most unelastic in their demands concerning these interrogatories although we have conferred on them for several hours on at least three occasions" (226).

While the record of the several conferences with the Magistrate are not in the record and SMITH has sought not to reproduce in the appendix the jig-saw puzzle of its requests for interrogatories, there is no basis that such dilatory tactics should be the basis for the dissolution of an injunction. Such acts if they be dilatory would properly be the subject of a motion for sanctions under Rule 34(a). SMITH sought dissolution of the preliminary injunction.

To support the dissolution of the injunction, or as SMITH's employee characterizes the injunction, "SMITH ought [not] to be forced to stay married to a distributor ... (190)" or as SMITH's counsel pleads, "the court's shot gun marriage of Smith and plaintiff by preliminary injunction is not happy, and ought not to be prolonged" (229).

There are two other non-appealing defendants, one being EQUIPMENT DISTRIBUTORS CORP., who "was the only designated distributor for SMITH in the counties of Manhattan, Brooklyn, Queens, Nassau and Suffolk -- the so-called 'Big Apple Region'."(25) and BROOKLYN UNION GAS CO., with whom "SMITH's representatives were equally upset when plaintiff attempted to 'bid' Brooklyn Union Gas Company, theretofore apparently considered the private domain of Equipment Distributors Corp. which because of its unique position was apparently able to charge all of its customers prices even higher than those set forth in SMITH's price sheets." (25)

Judge Platt in analyzing the five business reasons for terminating the distributorship advanced by SMITH's regional manager, Paul Toth, (23) said:

> "In short, the defendant's claimed 'proper business reasons' for the termination of the Agreement between the parties leave a lot to be desired. All of

the reasons advanced, except possibly the first, appear to have been put together after the act in an attempt to justify the same. In essence, each was without much substance and individually or collectively would not appear to have justified the drastic action taken.

"The same is essentially also true with respect to SMITH's first reason. The Court does not believe that a company such as SMITH would base a decision on such a reason without a careful investigation of the facts to make sure they supported the reason. In this case they clearly did not . . .

"The discrepancy is substantial and material and can only lead the Court to believe that the real reasons for the attempted termination were other than those advanced by SMITH." (23-24)

While SMITH's counsel claims not to have refused depositions of his client and disputes the Magistrate (Page 22 of Brief), such is hardly the basis for review by this Court. The Magistrate's report states:

"It ill becomes Smith to make this complaint. Smith's attorneys several times refused in my presence to produce any corporate officer of Smith for an examination before trial unless and until the plaintiff answered Smith's written interrogatories. Smith's interrogatories are as complex and complicated a puzzle as any jig-saw that may be contrived and Smith's attorneys have been most unelastic in their demands concerning these interrogatories although we have conferred on them for several hours on at least three occasions." (228) [Emphasis Added]

SMITH's counsel takes umbrage at the Magistrate's report and reacts to being characterized as "abrasive".

The Magistrate did not single out SMITH's counsel,but said that "both counsel make abrasive utterances . . . ." (228)

The Magistrate characterized the interrogatories "as complex and complicated a puzzle as any jig-saw that may be contrived" and concludes that the "interrogatories and the manner in which they are being dealt with are reminiscent of the evils in the old Equity Rules which the Federal Rules of Civil Procedure were intended to eradicate."

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

It is clear from the report that the Magistrate was attempting to move the case along so that the action would reach the trial stage promptly, while SMITH's counsel was and still is insisting on pettifogging the most minute points involved. The result has been numerous conferences with the Magistrate, practice motions, an appeal - all of which creates diversions from the purpose of the process: To resolve the real issues. Yet SMITH complains the "discovery proceedings have imposed the extraordinary burden of a preliminary injunction for a period of ten months . . ." (Brief Page 24)

Judge Milton Pollack in a revision of an address delivered before the Ninth Judicial Conference in Reno, August 2, 1974, published as "Pretrial Procedures More Effectively Handled," 275 N.Y.S. 2d #3, P. 13, December 30, 1975, wrote:

> ". . .[T]he great achievement in 1938 of the Federal Rules of Civil Procedure was the simplification of pleadings and pretrial procedures. But, that has been disintegrating and may have been lost altogether in the interim by the detailed and usually oppressive steps allowed in pretrial discovery, depositions and particularly interrogatory procedure and by the minutely detailed pretrial steps and orders required for all cases by many Judges." [Emphasis Added]

What really is at the heart of the matter is the obvious frustration the Magistrate had in dealing with SMITH's counsel whom he did characterize as being "unelastic" when the Magistrate -

> "... pointed out to Smith's attorney that his client very well may become liable for all fees of plaintiff's attorney in this case, agreed to review carefully his answers to Smith's interrogatories and give answers fully and in the most minute and specific detail as required and without regard to the time that would have to be devoted to the task in doing so. Plaintiff is to comply by January 28, 1976."

It is respectfully submitted that the example of the response to interrogatory "8" (226-228) clearly shows the great devotion to minutiae indulged in by SMITH.

SMITH comes to this Court complaining of a variety of very small and insignificant matters, not one of which involve new facts.

Judge Platt listed five reasons SMITH advanced to justify terminating the distributors agreement (21) which included; service, warranty and violation of credit rules. The only new aspects claimed are: the disparagement of plaintiff's employees and dilatory tactics.

The Magistrate and Court below held that -

> "A.O. Smith has failed in its efforts to show the existence of new facts such as would justify dissolution of the preliminary injunction granted herein under date of May 1, 1975."

In the hearing on the preliminary injunction Judge Platt made an assessment of the credibility of SMITH's position and found it wanting. The opinion and order were not appealed. As to SMITH's present appeal to dissolve the preliminary injunction, it violates the expression of Chief Judge Friendly in Omega Importing Corp. v. Petri-Kine Camera Co., 451 F. 2d 1190 (2d Cir. 1971):

> "An appellate court must indeed accept a district court's assessment of credibility".

In United States v. Aluminum Company of America, 148 F. 2d 416, 433 (2d Cir., 1945), Judge Learned Hand stated:

> "Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far [reversing findings of fact]; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

This court has appellate jurisdiction under 28 U.S.C. §1292 (a).

SMITH claims that the "preliminary injunction mandates a business relationship requiring continued proper performance by plaintiff". SISCO claims an anti-trust reason for the termination of its distributors agreement, based upon SISCO's refusal to sell only in Staten Island; SISCO's unwillingness to raise prices and SMITH's obvious desire to protect its only other distributor. In International

Railways v. United Brands, Nos. 192, 193, September Term 1975, 2d Cir., Slip opinion March 4, 1976, at P. 2315, Judge Mulligan stated:

> "...[M]onopolization . . . is the exercise of a power to fix prices or to exclude competition."

Overlooking however, that the harmony or disharmony as the case may be is and has been the creation of PAUL TOTH, SMITH's district sales manager, and that the lack of SMITH heaters and boilers would drive SISCO out of business, SMITH complains that the increased sales effected by SISCO over the period of time are a hardship. On this state of facts there can be no question that the procedural maneuvering and wrangling by SMITH has prolonged the temporary injunction. The motion to dissolve the injunction made four-and-a-half months after it was granted together with the appeal therefrom effectively extend the preliminary injunction by about seven months. The motion and the appeal have been acts of SMITH.

In Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co., 363 U.S. 528, 535 (1960), Chief Justice Warren stated:

> "And although respondents maintain that there has been such an abuse in this case, scrutiny of the record does not persuade us that the evidence was insufficient to support the judge's action."

Ideal Toy Corporation v. Fab-Lu Ltd. (Inc.), 360 F. 2d 1021, 1022 (2d Cir. 1966), dealt with a motion for a preliminary injunction in a copyright infringement case. Judge Moore stated the general rule on the scope of an appellate court's review of the lower court's injunction order, saying:

> "'The court's function in reviewing the grant or denial of preliminary injunction is a limited one. A motion for such relief is directed to the sound discretion of the district judge whose decision will not be reversed unless an abuse of discretion is apparent.' Joshua Meier Co. v. Albany Novelty Mfg. Co., 236 F. 2d 144, 146 (2d Cir. 1956); see American Visuals Corp. v. Holland, 261 F. 2d 652 (2d Cir. 1958) ...."

Chief Judge Moore in deciding Unicon Management Corp. v. Koppers Company, 366 F. 2d 199,203 (2d Cir. 1966), stated in connection with consolidated appeals from a motion granting a preliminary injunction and denying a subsequent motion to vacate the preliminary injunction:-

> "On the basis of the findings of fact made by the district court, which we must accept unless clearly erroneous, Federal Rules of Civil Procedure, Rule 52(a) we find that it was not an abuse of discretion to issue a preliminary injunction in this case."

Justice Murphy, speaking for a unanimous

court in Deckert v. Independence Shares Corp., 311 U.S. 282, 290, (1940) stated:

> "'It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. 'Prendergast v. New York Telephone Co., 262 U.S. 43, 50-51; Meccano Ltd. v. Wanamaker, 253 U.S. 136, 141."

Thus, the real issue is whether the findings by the Magistrate in his report (224-230) adopted by the Court (222-223) are clearly erroneous. 9 Federal Practice and Procedure by Wright and Miller, §2585; United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)

Chief Justice Berger, speaking for a unanimous court in Brown v. Chote, 411 U.S. 452 (1973) stated:

> "In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. Alabama v. United, 279 U.S. 229, 73 L Ed 675, 49 S Ct. 266 (1929); United States v. Corrick, 298 US 435, 80 L Ed 1263, 56 S Ct. 829 (1936) ....."

It is submitted that SMITH while striving to get the case on the trial calendar is proceeding in an inconsistent and haphazard fashion which creates delays and

deters from the resolution of the case rather than expediting it. The within appeal not only lacks merit, but represents an unnecessary diversion of the Court's time and all of counsel's efforts.

SMITH has presented no new facts which would have affected the granting or denial of the original injunction.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DATED JANUARY 15, 1976, SHOULD BE AFFIRMED.

Respectfully submitted,

LOUIS C. PULVERMACHER,
Attorney for Plaintiff

Mark Grossman
On The Brief

A 202 Affidavit of Personal Service of Papers
COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

STATEN ISLAND SUPPLY CO.,
Plaintiff -Appellee,

- against -

A. O. SMITH xxxx,
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 5 TH *day of* Apirl *19*76 *at* 666 Fifth Avenue, New York New York

deponent served the annexed Brief *upon*

Turk Marsh Kelly & Hoare
the Attorneys *in this action by delivering* 2 *true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 5th
day of April *19*76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer